

NJ High Court Prevents Rush To Courthouse On Spill Suits

By **Martin Bricketto**

Law360, New York (January 27, 2015, 7:16 PM ET) -- The New Jersey Supreme Court's rejection of a six-year window for private contribution actions over contaminated sites should foster negotiations before litigation erupts and promote site cleanups by closing an escape hatch for alleged polluters who may owe a share of the costs, attorneys say.

Monday's decision for shopping center owner Morristown Associates restores and bolsters a long-held understanding, in state court at least, that no statute of limitations covers private claims seeking cleanup and removal expenses under the New Jersey Spill Compensation and Control Act, many environmental practitioners say.

That understanding was rattled in 2013 when the state Appellate Division backed summary judgment for heating oil companies and the onetime owners of a dry-cleaning business that Morristown Associates sued for the cost of cleaning up leaks from the pipes of an underground storage tank. In a published decision, the appellate court retroactively applied a general six-year limitations period in the state for property damage claims to the company's demand for contribution.

But the Supreme Court found that, based on the plain language of the Spill Act, lawmakers didn't intend to provide contribution targets with a statute of limitations defense. That also fits with the Spill Act's role as remedial legislation that's supposed to cast a wide net over entities that are responsible for the discharge of hazardous substances, the court said.

The decision could prove important for thousands of contaminated sites in the state that still require cleanups, according to Edward Lloyd of Columbia Law School's Environmental Law Clinic, who argued the case for amicus participants including Ironbound Community Corp., the Association of New Jersey Environmental Commissions and Environment New Jersey.

"I think it will promote more cleanups and make more responsible parties available to do the cleanups," Lloyd said. "I think that was the intent of the Spill Act in the first place — to reach back and to hold parties responsible for the pollution they created."

Before the appellate ruling, a statute of limitations defense might have been "pled in every answer to every complaint" with a Spill Act claim, but it was never really litigated because no defendant thought it would fly, according to Archer & Greiner PC partner David Edelstein.

"Practitioners have been operating under the assumption that there wasn't [a limitations period], and the Appellate Division decision created some uncertainty and complications in the cleanup process," Edelstein said. "This ensures that people can keep doing things the way they have been doing them and, in a way, that promotes cleanups."

While some parties rushed to file suits and preserve claims following the appellate decision, the clarity provided by the Supreme Court should give property owners and their attorneys ample time to evaluate site-specific issues and work toward settlements with other potentially responsible entities over cleanup costs, according to Dennis Toft, the co-chair of Wolff & Samson PC's environmental group.

"I think it's good for the process overall because the court clearly recognized that the main purpose of the Spill Act is to get sites cleaned up and not just generate litigation where litigation may not be appropriate or can occur later in the process," Toft said.

If parties do decide to bring claims, they can do so after all the costs have been established and the evidence backing those expenses has been collected, according to Ira M. Gottlieb, who heads McCarter & English LLP's environment and energy practice group.

"This may provide contribution plaintiffs with an advantage in litigation that may occur many years after a spill or release occurred, and after structures have been removed or altered, witnesses are lost and other evidence grows stale or is no longer available," Gottlieb said

While the absence of a limitations period for private Spill Act claims may have been an understanding among environmental attorneys, there was apparently enough gray area for the appellate court to take a different approach.

As part of its analysis, the appellate court found that applying the statute of limitations was consistent with a six-year window under the federal Comprehensive Environmental Response, Compensation and Liability Act for actions to recover cleanup costs and also noted that federal court decisions in New Jersey have applied a six-year limitations period for Spill Act claims.

Monday's decision trumps both the appellate ruling and that federal interpretation of the Spill Act, which might have previously represented a bargaining chip for contribution defendants but is no longer on the table, according to Laurie Sands of Riker Danzig Scherer Hyland & Perretti LLP. Federal courts will now follow the Morristown Associates decision in mulling Spill Act claims, she said.

An applicable statute of limitations would have ensured that Spill Act cases were brought in a timely manner and helped protect evidence and testimony, according to Sands. However, the decision should allow parties to focus on cleanups and perform the kind of due diligence that has become even more important following the Supreme Court's 2012 ruling in *New Jersey Department of Environmental Protection v. Dimant*.

In that case, the court found that the DEP had failed to demonstrate a sufficient link between groundwater contamination in Bound Brook, New Jersey, and the alleged discharge of perchloroethylene by Sue's Clothes Hanger Inc., a laundromat and dry-cleaning business that the regulator sued under the Spill Act for investigation and remediation costs.

"In this matter, a party in Sue's circumstances must be shown to have committed a discharge that was connected to the specifically charged environmental damage of natural resources — the groundwater

damage — in some real, not hypothetical, way," that opinion said. "A reasonable nexus or connection must be demonstrated by a preponderance of the evidence."

Monday's decision gels with the ruling in Dimant, according to Sands.

"This probably was the right way to go," she said. "It gives people the time of cleaning up the site but also gathering that evidence to support a Spill Act claim if they want to bring one."

Sands was among the attorneys who represented the New Jersey State Bar Association as an amicus participant in the case. The bar association feared that the retroactive application of the statute of limitations could generate unfair malpractice litigation against attorneys who properly advised their clients based on the current state of the law.

"This could have really hurt the environmental bar," Sands said. "They could have been facing claims from their clients saying, 'Why didn't you say something, what didn't you tell me about this?'"

The case is *Morristown Associates v. Grant Oil Co. et al.*, case number 073248, in the New Jersey Supreme Court.

--Editing by Katherine Rautenberg and Philip Shea.